



4910-06-P

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Railroad Administration**

#### **49 CFR Part 242**

**[Docket No. FRA-2009-0035, Notice No. 3]**

#### **2130-AC36**

#### **Conductor Certification**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule; response to petitions for reconsideration.

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**SUMMARY:** This document responds to two petitions for reconsideration of FRA's final rule, published on November 9, 2011, which prescribed regulations for certification of conductors as required by the Rail Safety Improvement Act of 2008. In response to the petitions, this document amends and clarifies certain sections of the final rule.

**DATES:** *Effective Date:* The rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Joseph D. Riley, Railroad Safety Specialist (OP)-Operating Crew Certification, U.S. Department of Transportation, Federal Railroad Administration, Mail Stop-25, Room W38-323, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6318); or John Seguin, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC-10, Mail Stop 10, West Building 3<sup>rd</sup> Floor, Room W31-217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6045).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Pursuant to § 402 of the Rail Safety Improvement Act of 2008, Pub. L. 110-432, 122 Stat. 4884, (Oct. 16, 2008) (codified at 49 U.S.C. 20163) (hereinafter “RSIA”) Congress required the Secretary of Transportation (Secretary) to prescribe regulations to establish a program requiring the certification of train conductors. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR § 1.49(oo).

On December 10, 2008, FRA’s Railroad Safety Advisory Committee (RSAC) accepted a task statement (No. 08-07) and agreed to establish the RSAC Conductor Certification Working Group (Working Group) whose overall purpose was to recommend to the full committee regulations responsive to the RSIA’s mandate concerning the certification of railroad conductors.

The Working Group reached consensus on all of its recommended regulatory provisions. On March 18, 2010, the Working Group presented its recommendations to the full RSAC for concurrence. All of the members of the full RSAC in attendance at the March meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group’s recommendations became the full RSAC’s recommendations to FRA.

Based on the recommendations of the RSAC, FRA published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on November 10, 2010. See 75 FR 69166. In the NPRM, FRA solicited public comment on the proposed rule and notified the public of its option to request a public hearing on the NPRM. In addition, FRA also invited comment on

a number of specific issues related to the proposed requirements for the purpose of developing the final rule. In response to the NPRM, FRA received written comments as well as advice from the Working Group in preparing a final rule which was published on November 9, 2011. *See* 76 FR 69802.

Following publication of the final rule, parties filed petitions seeking FRA's reconsideration of the rule's requirements -- the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the United Transportation Union (UTU) submitted a joint petition (BLET/UTU Petition) and the Association of American Railroads, the American Public Transportation Association, and the American Short Line and Regional Railroad Association submitted a joint petition (AAR Petition). These petitions principally relate to the following subject areas: the implementation dates; 49 CFR part 217 and 218 testing; conductor assistants on main track; and the appeals process. In addition to the issues raised in the petitions, clarification of the final rule is needed with respect to the applicability of the rule to those persons who perform what have traditionally been known as hostler assignments.

This document responds to all the issues raised in the petitions for reconsideration and amends and clarifies certain sections of the final rule. The amendments contained in this document generally clarify the requirements contained in the final rule or allow for greater flexibility in complying with the rule, and are within the scope of the issues and options discussed, considered, or raised in the NPRM.

## **II. Issues Raised by Petitions for Reconsideration**

### **A. Implementation Dates**

The AAR Petition requests that the implementation dates in the final rule be

extended because: (1) they are inconsistent with the anticipated timeline provided in the NPRM; (2) they are inconsistent with the timing of railroad training; and (3) they do not permit enough time for training, testing and evaluating conductors. In the NPRM, FRA stated that it was proposing an effective date of January 1, 2012 for the final rule “based on FRA’s anticipation that the final rule will be published in early 2011.” Since the final rule was published in late 2011 (about 6 months after the anticipated publication date), the Petition argues that the implementation dates should be adjusted accordingly.

According to the Petition, railroads typically formulate their training programs in the fall and their trainers have to be prepared at the beginning of the year. The implementation dates in the final rule do not permit sufficient time to implement their training programs or to make pertinent changes to their IT systems used to comply with the regulations.

According to the Petition, it takes an average of 6 months to train a conductor. However, the period between the likeliest program approval date (*i.e.*, April 29) and the date that Class I’s must test and evaluate conductors (*i.e.*, June 1) leaves only one month to test and evaluate conductors. Further, the Petition notes that FRA has adjusted implementation dates of previous rulemakings to comport with railroad training schedules (*e.g.*, Part 218).

FRA acknowledges that the final rule was published later than anticipated. Therefore, to provide a reasonable amount of time for the railroads to implement their training programs, FRA is retaining the current effective date of the final rule (*i.e.*, January 1, 2012) but is extending the implementation dates by 6 months. For the convenience of interested parties, a table is provided below showing the changes to the implementation dates:

| <b>Event</b>  | <b>Final Rule Implementation Dates</b>  | <b>Amended Implementation Dates</b>   |
|---|---|---|
| <b>Effective Date</b>   | Jan. 1, 2012  | Jan. 1, 2012  |
| <b>Designate and issue certs. to all authorized as of Jan. 1, 2012</b><br>[242.105(a)]  | <u>By</u> March 1, 2012   | <u>By</u> Sept. 1, 2012   |
| <b>Grandfather and issue certs. for all authorized between Jan. 1 and June 1, 2012 (Class I &amp; II) or Oct. 1, 2012 (Class III)</b><br>[242.105(b)] | <u>After</u> March 1, 2012  | <u>After</u> Sept. 1, 2012  |
| <b>Maintain a list of each designated conductor</b><br>[242.205(a)]   | <u>After</u> March 1, 2012  | <u>After</u> Sept. 1, 2012  |
| <b>Class I &amp; II submit program to FRA</b> [242.103(a)(1)]   | <u>By</u> March 30, 2012  | <u>By</u> Sept. 30, 2012  |
| <b>Class I &amp; II must have approved program</b> [242.101(a)]   | <u>By</u> June 1, 2012  | <u>By</u> Dec. 1, 2012  |
| <b>Class III submit program to FRA</b> [242.103(a)(2)]  | <u>By</u> July 30, 2012   | <u>By</u> Jan. 31, 2013   |
| <b>Class III must have approved program</b> [242.101(a)]  | <u>By</u> Oct. 1, 2012  | <u>By</u> April 1, 2013   |
| <b>Program approval</b> [242.103(g)]  | Program considered approved and may be implemented 30 days after required filing date | Program considered approved and may be implemented 30 days after required filing date |
| <b>Class I &amp; II must subpart B test</b><br>[242.105(d)]   | <u>After</u> June 1, 2012   | <u>After</u> Dec. 1, 2012   |
| <b>Class III must subpart B test</b><br>[242.105(e)]  | <u>After</u> Oct. 1, 2012   | <u>After</u> April 1, 2013  |
| <b>Annual program review</b><br>[242.215(a)]  | Beginning in 2013   | Beginning in 2014   |

B.     Part 217 and 218 Testing

The AAR Petition requests that FRA clarify that testing under 49 CFR part 217 and 218 is not affected by the final rule. In the preamble to the final rule, FRA noted that a

railroad could not test and evaluate a designated conductor or conductor candidate under subpart B of the final rule until the railroad had a certification program approved by FRA. According to the AAR Petition, that prohibition combined with § 242.123(c), which requires that each conductor shall be given at least one unannounced compliance test annually in accordance with parts 217 and 218, presents a potential timing issue that may leave railroads with insufficient time to conduct part 217/218 testing.

FRA acknowledges that a railroad that follows the schedule provided in the final rule may not have sufficient time to conduct part 217/218 testing pursuant to the final rule if it is not permitted to test prior to having an approved program in place. Moreover, parts 217 and 218 provide testing procedures that railroads must follow irrespective of whether they have a conductor certification program in place. Thus, FRA is clarifying the final rule to indicate that part 217/218 testing is not covered by the final rule's statement regarding testing prior to the approval of a program.

C.      *Conductor Assistant*

The AAR Petition requests that § 242.301(c) of the final rule be amended to remove the requirement for a non-crewmember to serve as a conductor's assistant on main track where the conductor lacks territorial qualification on the main track physical characteristics. The AAR Petition asserts that the final rule should be amended because: (1) the changes regarding the assistant were made at the final rule stage and were not what was agreed to at the RSAC; (2) the rule is inconsistent with the position that UTU had taken outside of the regulatory process (*i.e.*, a 2010 agreement with CSX which purportedly permits an engineer, who is a member of the crew, to serve as an assistant for a conductor unfamiliar with the

territory over which the train is operating); (3) FRA failed to conduct a cost-benefit analysis of its prohibition on the engineer serving as an assistant on main track which will cost the industry millions of dollars annually by requiring an extra person in the cab to serve as a conductor or by requiring the industry to take conductors on “pilot trips”; (4) the rule could adversely affect passenger railroad finances and services because of delays, cancelations, train evacuations, and platform crowding if no employee is available who is not a member of the crew to serve as the conductor’s assistant; and (5) FRA failed to demonstrate measurable safety benefits of the rule and no safety benefit exists. The AAR petition asserts that it is “particularly egregious” to prohibit the engineer from serving as the assistant to the conductor in circumstances where the conductor was previously qualified over the territory but whose qualification has lapsed.

Although the final rule modified the requirements proposed in the NPRM regarding assistants on main track, FRA believes that safety concerns (*i.e.*, the safe operation of a train in difficult operating environments on main track combined with the need to maintain the roles of each crewmember in those situations) necessitate the need to modify those requirements. A conductor, who has never been qualified on the physical characteristics of the territory, would not have the knowledge to be able to fulfill his or her role on the train and an assigned crew member serving as an assistant would be distracted from their other duties and may not be able to provide a check on the judgments of the other crew members. In addition, there are some unique situations on main track which highlight the need for an assistant that is familiar with the territory and can provide a check on the engineer with respect to safe operation of the train over the territory. For example, terminals that serve as

multiple hubs where conductors can be sent in multiple directions over main track where they are required to negotiate multiple signal systems each governed by a different set of rules.

The conductor plays a key role in rail operations by, *inter alia*, determining the train consist, ensuring compliance with hazardous materials placement and documentation requirements, calling or acknowledging signals, receiving mandatory directives, conducting frequent briefings with the locomotive engineer to ensure compliance with movement restrictions, intervening through use of the conductor's brake valve if the engineer is unresponsive or incapacitated, and using their knowledge of the operating environment to identify safety concerns and resolve them. *See, e.g.*, General Code of Operating Rules section 1.47 and NORAC Operating Rules rule 94 and 941. Within this framework, a conductor must remain able to provide a check on the judgments made by another crew member.

Each railroad is free, within the constraints of collective bargaining agreements as to staffing, and subject to oversight by FRA with respect to safety, to determine its operating rules and assignment of responsibilities to its personnel. Nevertheless, FRA remains concerned that railroad operating crews function as a team, discharging their responsibilities on the basis of adequate information and using their knowledge of the operating environment to identify safety concerns and resolve them. Within this framework, each crew member must remain able to respectfully and helpfully question a judgment by another crew member. This general approach is known as "crew resource management" (CRM), a concept perfected in aviation and urgently pressed on the railroad industry by the National



Transportation Safety Board and the FRA. See NTSB Recommendation R–99–13 (July 29, 1999). Major railroads have included CRM in their training programs.

It is particularly important that a conductor have an assistant who is not distracted either by or from their other duties now that conductors may be decertified for actions they take or fail to take during the operation of a train. Indeed, this rulemaking is holding conductors to a higher level of accountability and requiring more severe consequences for failing to meet that level than they have ever faced before. Accordingly, principles of fairness and safety dictate that conductors be provided all the tools, knowledge, and oversight needed to meet this higher level of accountability. Providing the proper tools, knowledge, and oversight should, in turn, create an even safer operating environment particularly where an assigned crew member is serving as the assistant. A more knowledgeable conductor will likely allow an assistant to focus less on assisting the conductor and more on their other duties. Similarly, in instances where a conductor is less familiar with a territory, there is a greater necessity to provide that conductor with an assistant that is not distracted by other duties.

Principles of fairness and safety also dictate that an engineer, who is directly responsible for operating the train and also subject to decertification, not be required to act as an assistant to a conductor, who possesses insufficient knowledge of the territory. Requiring an engineer to provide extensive assistance to a conductor could potentially result in that engineer being distracted from other safety critical duties. FRA’s decision on this issue must be based on safety considerations and should not be impacted by what a railroad and representatives of its employees may have agreed to in the past, particularly when the

level of accountability was not as high as it is now.

Although the AAR Petition asserts that the final rule's prohibition on an assigned locomotive engineer serving as a conductor's assistant on main track where the conductor lacks territorial qualification on the main track physical characteristics will "cost the industry millions of dollar[s] annually" by requiring an extra person in the cab or by requiring railroads to take conductors on "pilot trips," the Petition does not provide evidentiary support for its assertion or an explanation of how it calculated the additional cost it claims the rule will require. Without this information, FRA cannot compare or respond to the cost claim.<sup>1</sup> However, contrary to the AAR Petition's assertion, FRA did, in fact, conduct an economic analysis of the final rule's prohibition on a locomotive engineer serving as a conductor's assistant on main track and included additional costs in its analysis of the final rule. In the final rule's Regulatory Impact Analysis, a copy of which was placed in the docket on <http://www.regulations.gov>, FRA explained that:

In the final rule, FRA modified the requirements in paragraph (c), and added paragraph (e). The cost estimates for the other requirements above still exist and are appropriate. While the modifications to paragraph (c) will impose additional burdens, FRA believes the exceptions in paragraph (e) along with the on-the-job training requirements of this final rule will serve to minimize this burden. FRA believes that the situation in which an assistant is required is most likely to occur on Class I railroads and occasionally on Class II railroads. When this situation does occur FRA is assuming it would require an additional railroad employee for approximately eight hours. FRA estimates that this situation will occur an average of 10 times per week for

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<sup>1</sup> The only specific cost claim made in the AAR Petition is that the Union Pacific Railroad (UP) estimates that it would cost an additional \$8.5 million annually for the UP alone to conduct the additional pilot trips for conductors. However, the AAR Petition provides absolutely no information about how that number was derived. For example, there is no indication of how many pilot trips would be required, how many employees would be involved in the trips or the wage rate of those employees, or how much time the trips would take. The AAR Petition also fails to provide information as to whether UP's estimate would apply to every railroad or whether the estimate would differ for each class of railroad. Without such information, it is impossible for FRA to respond to the cost claims in the AAR Petition or to even compare its own economic analysis with the claims made in the AAR Petition.

the railroad industry. The annual cost for this is estimated to be \$180,000. For a 20-year period, this is estimated to total \$3.4 million, and the PV is \$1.7 million.

Final Rule Regulatory Impact Analysis (Oct. 19, 2011) at 30. Further, the analysis provided FRA's calculation of the cost: "Calculation: (10 occurrences/week) \* (8 hours) \* (\$43.20 wage) \* (52 weeks) = \$179,712 per year which is rounded up to \$180,000." Id. at note 56. Absent verifiable evidence to the contrary, FRA continues to believe that this situation should be a relatively rare occurrence which can be largely avoided by the railroads simply by keeping their conductors trained and qualified.

FRA recognizes the passenger railroads' concerns regarding the potential economic and service impact of prohibiting a crewmember from serving as an assistant in certain situations, but notes that passenger railroads have successfully dealt with a similar issue with locomotive engineers under part 240 for many years without excessive financial burdens or service delays being incurred.<sup>2</sup> Moreover, FRA expects this situation to be a relatively rare occurrence for passenger railroads.<sup>3</sup>

While FRA declines to revise the requirement in the final rule requiring a non-crewmember to serve as a conductor's assistant on main track where the conductor has never been qualified on the main track physical characteristics of the territory over which he or she is to serve as a conductor, FRA believes that it can provide some flexibility to the

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<sup>2</sup> With certain exceptions, § 240.231 prohibits an assigned crew member from serving as an assistant to a locomotive engineer who lacks qualification on the physical characteristics of the territory over which they are to operate.

<sup>3</sup> Similar to the AAR Petition's claims regarding pilot trip costs, the Petition provides no information or evidentiary support as to what "financial burden" passenger railroads may face. Without such information, it is again impossible for FRA to respond to the financial claims in the AAR Petition.

railroads with respect to conductors whose qualifications have been expired for one year or less and who have regularly traversed the territory prior to the expiration of the qualifications. In that scenario, the safety concerns are reduced because it is likely that the assistant would need only to provide minimal assistance to the conductor due to the conductor's familiarity with the physical characteristics of the territory.

For a conductor who was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has been expired for one year or less and who regularly traversed the territory prior to the expiration of the qualification, this response provides that the assistant may be any person, including an assigned crewmember, who meets the territorial qualification requirements for main track physical characteristics. For a conductor whose qualification has been expired for one year or less but who has not regularly traversed the territory prior to the expiration of the qualification, or a conductor whose territorial qualification on main track has been expired for more than a year, this response provides that the assistant may be any person, including an assigned crewmember other than the locomotive engineer so long as serving as the assistant would not conflict with that crewmember's other safety sensitive duties, who meets the territorial qualification requirements for main track physical characteristics.

In order to determine when a conductor's territorial qualification has expired and whether the conductor regularly traversed the territory prior to the expiration of the qualification, FRA is requiring that each railroad indicate in its program how long a conductor must be absent from a territory before the conductor's qualification on the physical characteristics of the territory expires and the number of times a person must pass

over a territory per year to be considered to have “regularly traversed” a territory for purposes of § 242.301(c). FRA believes that those requirements will help ensure that conductors travel over a territory with sufficient regularity to maintain knowledge of the physical characteristics. Further discussion of those requirements is contained below in the analysis of the revisions to Appendix B of part 242.

D. Appeals Process

The BLET/UTU Petition requests reconsideration of FRA’s decision not to adopt the BLET/UTU’s proposal for changing the appeals process provided in §§ 242.501, 503, 505, 507, 509 and 511 of the final rule. The proposal would eliminate appeals to an Administrative Hearing Officer (AHO), except in cases where the Operating Crew Review Board (OCRB) or a party wants a specific issue developed further, require the OCRB to grant a decision if any procedural error by the railroad is shown, add an attorney as a member to the OCRB, eliminate the opportunity for parties to appeal FRA decisions to the Administrator, and make the OCRB decision final agency action. According to the BLET/UTU Petition, the proposal will make the appeals process more balanced, efficient, and less costly.

FRA declines to adopt BLET/UTU’s proposed revisions to the appeals process. The proposed appeals process was thoroughly discussed during the Working Group meetings and most of BLET/UTU’s suggestions were rejected at those meetings. As explained to the Working Group and indicated in the preamble to the final rule, due process requirements and issues concerning trials *de novo* necessitate that FRA retain the OCRB and AHO as distinct levels of review. Moreover, despite BLET/UTU’s assertions to the contrary, FRA continues

to believe that the BLET/UTU proposal would result in a significant increase in the number of cases/issues handled by the AHO and the federal courts thereby causing cases to take much longer to resolve and involve increased costs for all parties involved.

Although FRA is not adopting BLET/UTU's proposals, FRA is committed to handling engineer and conductor certification cases as quickly as possible and is taking steps to make the appeals process more efficient. Over the past two years, the average length of time for the AHO to render a decision in a locomotive engineer case under part 240 has dropped by 6 months. One of the steps FRA has taken is to revise the requirements proposed in the NPRM to require petitions to be submitted to the Docket Clerk of DOT rather than FRA's Docket Clerk. With that change, the process for submitting petitions to the OCRB will parallel the process for requesting an administrative hearing under part 240 and § 242.507. FRA believes this change will make the process more efficient as DOT Dockets is better equipped to process and store these types of filings.

### **III. Clarifying Amendment**

#### **Hostler-Type Assignments**

Following the publication of the final rule, it was brought to FRA's attention that the final rule may be unclear regarding the applicability of the rule to those persons who perform what have traditionally been known as hostler assignments. Those assignments typically involve moving locomotives within the confines of a locomotive servicing area or car repair shop area.

FRA did not intend for a person performing those types of assignments to be covered by the requirements of part 242. As FRA stated in the section-by-section analysis of the

Final Rule, “[a]ll other train or yard crew members (e.g., assistant conductors, brakemen, hostlers, trainmen, switchmen, utility persons, flagmen, yard helpers, and others who might have different job titles but perform similar duties and are not in charge of a train or yard crew) do not fall within the definition of ‘conductor’ for purposes of this rule.” 76 FR 69815. To ensure that interested parties are clear on this issue, FRA states in the section-by-section analysis below that a person who moves a locomotive or a group of locomotives within the confines of a locomotive repair or servicing area as provided for in 49 CFR 218.5 and 218.29(a)(1) or moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes is not subject to the requirements of part 242.

#### **IV. Section-by-Section Analysis**

FRA is modifying certain provisions of 49 CFR part 242 in response to the petitions for reconsideration and issues raised following the publication of the final rule. This section of the preamble explains the changes made to the final rule. FRA respectfully refers interested parties to the agency’s Section-by-Section Analysis of the final rule and the Notice of Proposed Rulemaking for a full discussion of those aspects of the rulemaking that remain unchanged. *See* 76 FR 69802 (Nov. 9, 2011) and 75 FR 69166 (Nov. 10, 2010).

##### ***Subpart A – General***

###### ***Section 242.7 Definitions***

While FRA is not modifying the definition of “conductor” in the final rule, FRA is clarifying its preamble discussion in the final rule’s Section-by-Section Analysis regarding the applicability of part 242 to railroad employees who perform what have traditionally been

known as hostler assignments. FRA did not intend for a person performing those types of assignments to be covered by the requirements of part 242. Accordingly, interested parties should note that a person who moves a locomotive or a group of locomotives within the confines of a locomotive repair or servicing area as provided for in 49 CFR 218.5 and 218.29(a)(1) or moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes is not subject to the requirements of part 242.

***Subpart B -- Program and Eligibility Requirements***

*Section 242.103 Approval of design of individual railroad programs by FRA.*

FRA is amending paragraphs (a)(1) and (a)(2) of this section to delay the date by which the railroads will have to submit their certification programs to FRA. The final rule required a Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service to submit a program to FRA no later than March 30, 2012 while a Class III railroad was required to submit a program by January 31, 2013. As indicated in the preamble that date is being pushed back 6 months. Accordingly, Class I, II, Amtrak, and commuter railroads must now submit their programs by September 30, 2012 while Class III railroads must submit a program by January 31, 2013.

Interested parties should note that, except for testing under parts 217 and 218 required by section 242.123, railroads may not test and evaluate a designated conductor or conductor candidate under subpart B of this rule until they have a certification program approved by the FRA pursuant to section 242.103.

*Section 242.105 Schedule for implementation.*



This section contains the timetable for implementation of the rule. FRA is amending paragraphs (a), (b), (d), and (e) of this section to delay the date by which the railroads must designate conductors and issue certificates to those designated conductors and the date by which railroads must test and evaluate non-designated conductor candidates pursuant to subpart B of the rule. As indicated in the preamble, those dates are being pushed back 6 months. Accordingly, by September 1, 2012, all railroads must designate and issue certificates to all persons authorized by the railroads to perform the duties of a conductor as of January 1, 2012. After September 1, 2012, Class I, II, Amtrak, and commuter railroads must designate and issue certificates to all persons authorized to perform as conductors between January 1, 2012, and December 1, 2012. For the Class III railroads, after September 1, 2012, Class I, II, they must designate and issue certificates to all persons authorized to perform as conductors between January 1, 2012, and April 1, 2013.

With respect to the dates by which railroads may not initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with subpart B of the rule, the date for the Class I, II, Amtrak, and commuter railroads is now “after December 1, 2012” while the date for the Class III railroads is now “after April 1, 2013.”

Interested parties should note that, except for testing under parts 217 and 218 required by section 242.123, railroads may not test and evaluate a designated conductor or conductor candidate under subpart B of this rule until they have a certification program approved by the FRA pursuant to section 242.103.

Interested parties should also note that another section of this rule (i.e., 242.101)

contains implementation dates which are derived from the dates provided this section. Thus, while the regulatory text for section 242.101 is not being amended, the changes to the dates in section 242.105 will impact the implementation requirements in section 242.101.

***Subpart C -- Administration of the Certification Program***

*Section 242.205 Identification of certified persons and record keeping.*

FRA is amending paragraph (a) of this section to delay the date by which the railroads are required to maintain a list of its certified conductors. As indicated in the preamble, the date is being pushed back by 6 months. Accordingly, railroads are now required to maintain that list after September 1, 2012.

*Section 242.215 Railroad oversight responsibilities.*

This section of the final rule required Class I (including the National Railroad Passenger Corporation and a railroad providing commuter service) and Class II railroads to conduct an annual review and analysis of their programs for responding to detected instances of poor safety conduct by certified conductors beginning in calendar year 2013. To conform with the rest of the implementation dates in part 242 that have been pushed back by 6 months, FRA is revising paragraph (a) of this section to read “beginning in calendar year 2014.”

***Subpart D -- Territorial Qualification and Joint Operations***

*Section 242.301 Requirements for territorial qualification.*

FRA is revising paragraph (c)(2) and adding paragraph (c)(3) to this section. Those paragraphs describe who may serve as an assistant to a conductor whose qualification on the physical characteristics of a main track territory has expired. For a conductor who was

previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has been expired for one year or less and who regularly traversed the territory prior to the expiration of the qualification, paragraph (c)(2) provides that the assistant may be any person, including an assigned crewmember, who meets the territorial qualification requirements for main track physical characteristics. For a conductor whose qualification has been expired for one year or less but who has not regularly traversed the territory prior to the expiration of the qualification, or a conductor whose territorial qualification on main track has been expired for more than a year, paragraph (c)(3) provides that the assistant may be any person, including an assigned crewmember other than the locomotive engineer so long as serving as the assistant would not conflict with that crewmember's other safety sensitive duties, who meets the territorial qualification requirements for main track physical characteristics.

### *Appendices*

Section 2 of Appendix B is being amended to add a requirement that railroads must state in their programs the number of times a person must pass over a territory per year to be considered to have “regularly traversed” a territory for purposes of § 242.301(c). This requirement is similar to what railroads already do in their part 240 programs and operating rules with respect to locomotive engineers who have not worked any trips over a territory for a period of time.

FRA recognizes the uniqueness of railroad territories and the differences in their complexity and, therefore, FRA is providing the railroads with the discretion to determine how many times a conductor must pass over a territory to be considered to have “regularly

traversed” a territory. Railroads have a higher level of familiarity with their territories than FRA, and thus, are in the best position to evaluate them to determine how many times a conductor must pass over a territory to safely use an assigned crewmember as an assistant. Indeed, many factors will affect the complexity of a territory. For example, signaling, grade and speed, the amount of territory covered, the number of lines that may be traversed, whether cars will be set off on branch lines and the differences between the branch lines, and joint operations over shared trackage are all factors that will need to be considered in determining the number of passes that a conductor must have made over a territory before an assigned crewmember may be safely utilized as an assistant to the conductor. Given the number of factors involved, FRA expects that different frequencies of travel will be required for different lines.

Although the railroads best understand the difficulties that their territory presents for a conductor, FRA will closely review each railroad’s program to ensure that the determinations regarding number of passes are reasonable in light of FRA’s understanding of the railroad’s operations. To that end, FRA recommends that each program contain a brief description of the railroad’s operations, including mileage, speed, signal systems, type of service provided, and any other factor the railroad considers significant to their operation.

## **V. Regulatory Impact and Notices**

### **A. Executive Order 12866 and DOT Regulatory Policies and Procedures**

This action has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. See 44 FR 11034; February 26, 1979. The original final rule was

determined to be non-significant. Furthermore, the amendments contained in this action are not considered significant because they generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule.

These amendments and clarifications provide more time and flexibility in the implementation of this final rule. In addition, the amendments to the conductor assistant requirements in § 242.301 should decrease the burdens related to providing assistants. Thus, these amendments will have a minimal net effect on FRA's original analysis of the costs and benefits associated with the final rule.

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, FRA developed this action and the original final rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this action would not have a significant economic impact on a substantial number of small entities.

The amendments contained in this action that modify the implementation dates will provide small entities more time to implement conductor certification programs. The amendments to the conductor assistant requirements should have no significant economic impact on small entities since most small railroads usually operate with small train crews or remote control operations with a single-person crew who will be dual certified and thus likely to be qualified as both an engineer and a conductor on the physical characteristics of

the territory over which they will operate. In addition, most smaller railroads have small territories and most of these territories, and their physical characteristics, likely will not change. Accordingly, because the amendments contained in this action generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has concluded that there are no substantial economic impacts on small entities resulting from this action.

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* None of the information collection requirements and corresponding burden time estimates below have changed in response to the petitions for reconsideration.

| CFR Section/Subject         | Respondent Universe | Total Annual Responses | Average Time per Response | Total Annual Burden Hours |
|-----------------------------|---------------------|------------------------|---------------------------|---------------------------|
| 242.9 - Waivers – Petitions | 677 railroads       | 10 petitions           | 3 hour                    | 30 hours                  |

|  |               |                                       |                                |              |
|--|---------------|---------------------------------------|--------------------------------|--------------|
| 242.101/103 - Certification Program:<br>Written Program for Certifying<br>Conductors                         | 677 railroads | 678 programs                          | 160 hrs./581<br>Hrs./15.5 hrs. | 16,799 hours |
| Approval of Design of Programs   | 6 railroads   | 6 new prog.                           | 15.5 hours                     | 93 hours     |
| - Certification Programs for New RRs   | 677 railroads | 200 copies                            | 15 minutes                     | 50 hours     |
| - Conductor Certification Submission<br>Copies to Rail Labor Organizations                                   | 677 railroads | 200 state-<br>ments                   | 15 minutes                     | 50 hours     |
| - Affirmative Statements that Copies of<br>Submissions Sent to RLOs  | 677 railroads | 35 comments                           | 4 hours                        | 140 hours    |
| - Certified Comments on Submissions  | 677 railroads | 10 programs                           | 4 hours                        | 40 hours     |
| - Certification Programs Disapproved<br>by FRA and then Revised  | 677 railroads | 3 programs                            | 2 hours                        | 6 hours      |
| -Revised Certification Programs Still<br>Not Conforming and then Resubmitted                                 | 677 railroads | 50 programs                           | 2 hours                        | 100 hours    |
| - Certification Programs Materially<br>Modified After Initial FRA Approval                                   | 677 railroads | 3 programs                            | 2 hours                        | 6 hours      |
| - Materially Modified Programs<br>Disapproved by FRA & Then Revised  | 677 railroads | 1 program                             | 2 hours                        | 2 hours      |
| -Revised programs Disapproved and<br>Then Resubmitted  | 677 railroads |                                       |                                |              |
| 242.105 –Implementation Schedule   | 677 railroads | 48,600<br>designations                | 5 minutes                      | 4,050 hours  |
| - Designation of Certified Conductors<br>(Class I Railroads)   | 677 railroads | 16,200 certif.                        | 1 hour                         | 16,200 hours |
| - Issued Certificates (1/3 each year)  | 677 railroads | 5,400 design.                         | 5 minutes                      | 450 hours    |
| - Designation of Certified Conductors<br>(Class II and III Railroads)  | 677 railroads | 1,800 certif.                         | 1 hour                         | 1,800 hours  |
| - Issued Certificates (1/3 each year)  | 677 railroads | 5,000 request                         | 30 minutes                     | 2,500 hours  |
| - Requests for Delayed Certification   | 677 railroads | 1,000 tests                           | 560 hours                      | 560,000 hour |
| - Testing/Evaluation to Certify Persons  | 627 railroads | 100 tests                             | 400 hours                      | 40,000 hours |
| -Testing/Evaluation to Certify<br>Conductors (Class III)   |               |                                       |                                |              |
| 242.107 – Types of Service   | 677 railroads | 25 conductor<br>Tests/<br>Evaluations | 8 hours                        | 200 hours    |
| -Reclassification to Diff. Type of Cert.   |               |                                       |                                |              |
| 242.109 – Opportunity by RRs for<br>Certification Candidates to Review and<br>Comment on Prior Safety Record | 677 Railroads | 200 records +<br>200 comment          | 30 minutes +<br>10 minutes     | 133 hours    |

|  |  |   |   |  |
|--|--|---|---|--|
| 242.111 – Prior Safety Conduct As Motor Vehicle Operator<br>- Eligibility Determinations<br>- Initial Certification for 60 Days<br>- Recertification for 60 Days<br>- Driver Info. Not Provided and Request for Waiver by Persons/RR<br>- Request to Obtain Driver’s License Information From Licensing Agency<br>- Requests for Additional Information From Licensing Agency<br>- Notification to RR by Persons of Never Having a License<br>- Report of Motor Vehicle Incidents<br>- Evaluation of Driving Record<br>- DAC Referral by RR After Report of Driving Drug/Alcohol Incident<br>- DAC Request and Supply by Persons of Prior Counseling or Treatment<br>- Conditional Certifications Recommended by DAC | 677 Railroads<br>677 Railroads<br>677 Railroads<br>677 Railroads<br><br>54,000 Conductors/<br>Persons<br>54,000 Conductors/<br>Persons<br>54,000 Conductors/<br>Persons<br>54,000 Conductors<br>54,000 Conductors<br>677 Railroads<br><br>677 Railroads<br><br>677 Railroads | 1,100 dtrmin.<br>75 certific.<br>125 recertif.<br>25 requests<br><br>18,000 req.<br><br>25 requests<br><br>2 notification<br><br>200 reports<br>18,000 eval.<br>180 referrals<br><br>5 requests/<br>Records<br>50 certificat. | 10 minutes<br>10 minutes<br>10 minutes<br>2 hours<br><br>15 minutes<br><br>10 minutes<br><br>10 minutes<br>10 minutes<br>5 minutes<br><br>30 minutes<br><br>4 hours | 183 hours<br>13 hours<br>21 hours<br>50 hours<br><br>4,500 hours<br><br>4 hours<br><br>.33 hour<br><br>33 hours<br>4,500 hours<br>15 hours<br><br>3 hours<br><br>200 hours |
| 242.113 –Prior Safety Conduct As Employee of a Different Railroad  | 54,000 conductors  | 360 requests/<br>360 records  | 15 minutes +<br>30 minutes  | 270 hours  |
| 242.115 – Substance Abuse Disorders and Alcohol Drug Rules Compliance:<br>- Meeting Section’s Eligibility Reqmnt<br>- Written Documents from DAC Person Not Affected by a Disorder<br>-Self-Referral by Conductors for Substance Abuse Counseling<br>- Certification Reviews for Occurrence/Documentation of Prior Alcohol/Drug Conduct by Persons/Conductors<br>- Written Determination That Most Recent Incident Has Occurred<br>- Notification to Person That Recertification Has Been Denied<br>- Persons/Conductors Waiving Investigation   | 54,000 conductors<br><br>677 railroads<br><br>54,000 conductors<br><br>677 railroads<br><br>677 railroads<br><br>677 railroads<br><br>54,000 conductors  | 18,000 determination<br><br>400 docs.<br><br>10 self-referrals<br>18,000 reviews<br><br>150 determin.<br><br>150 notific.<br><br>100 waivers  | 2 minutes<br><br>30 minutes<br><br>10 minutes<br><br>10 minutes<br><br>60 minutes<br><br>10 minutes<br><br>10 minutes   | 600 hours<br><br>200 hours<br><br>2 hours<br><br>3,000 hours<br><br>150 hours<br><br>25 hours<br><br>17 hours  |



|   |                   |                            |                        |                  |
|---|-------------------|----------------------------|------------------------|------------------|
| 242.117- Vision and Hearing Acuity  |                   |                            |                        |                  |
| - Determination Vision Standards Met  | 677 railroads     | 18,000 deter.              | 20 minutes             | 6,000 hours      |
| - Determination Hearing Stds. Met   | 677 railroads     | 18,000 deter.              | 20 minutes             | 6,000 hours      |
| - Additional Gap Hearing Tests  | 677 railroads     | 200 deter.                 | 20 minutes             | 67 hours         |
| - Medical Examiner Certificate that Person Has Been Examined/Passed Test                          | 677 railroads     | 18,000 certif.             | 2 hours                | 36,000 hours     |
| - Document Standards Met with Conditions  | 677 railroads     | 50 document                | 30 minutes             | 25 hours         |
| - Document Standards Not Met  | 677 railroads     | 25 document                | 30 minutes             | 13 hours         |
| - Notation Person Needs Corrective Device (Glasses/Hearing Aid)                                   | 677 railroads     | 10,000 notes               | 10 minutes             | 1,667 hours      |
| - Request for Further Medical Evaluation for New Determination                                    | 677 railroads     | 100 requests + 100 Evals.  | 60 minutes + 2 hours   | 300 hours        |
| - Request for Second Retest and Another Medical Evaluation  | 677 railroads     | 25 requests + 25 Evals.    | 60 minutes + 2 hours   | 75 hours         |
| - Copies of Part 242 Provided to RR Medical Examiners   | 677 railroads     | 677 copies                 | 60 minutes             | 677 hours        |
| - Consultations by Medical Examiners with Railroad Officer and Issue of Conditional Certification | 677 railroads     | 100 consults + 100 certif. | 2 hours + 10 minutes   | 217 hours        |
| -Notification by Certified Conductor of Deterioration of Vision/Hearing                           | 677 railroads     | 10 notific.                | 10 minutes             | 2 hours          |
| 242.119 - Training  |                   |                            |                        |                  |
| - Completion of Training Program  | 677 railroads     | 678 Program                | 36 hours/ 70 hrs/3 hrs | 3,751 hours      |
| - Modification to Training Program  | 677 railroads     | 678 Program                | 12 hrs/20 hrs/ 30 min. | 934 hours        |
| - Completion of Training Program by Conductors/Persons + Documents                                | 54,000 Conductors | 18,000 Docs/ 18,000 Cond.  | 1 hour/560 hours       | 10,098,000 hours |
| - Modification of Training Program Due to New Laws/Regulations                                    | 677 railroads     | 30 programs                | 4 hours                | 120 hours        |
| - Consultation with Supervisory Employee During Written Test                                      | 677 railroads     | 1,000 consult              | 15 minutes             | 250 hours        |
| - Familiarization Training Upon Transfer of RR Ownership  | 677 railroads     | 10 trained Conductors      | 8 hours                | 80 hours         |
| - Continuing Education of Conductors  | 677 railroads     | 18,000 cont. trained cond. | 8 hours                | 144,000 hour     |
| 242.121 – Knowledge Testing   |                   |                            |                        |                  |
| - Determining Eligibility   | 677 railroads     | 18,000 deter.              | 30 minutes             | 9,000 hours      |
| - Retests/Re-Examinations   | 677 railroads     | 500 Retests                | 8 hours                | 4,000 hours      |

|  |                                |   |  |                          |
|--|--------------------------------|---|--|--------------------------|
| 242.123- Monitoring Operational Performance<br>- Unannounced Compliance Tests and Records<br>- Return to Service That Requires Unannounced Compliance Test/Record                      | 677 railroads<br>677 railroads | 18,000 tests + 18,000 recd<br>1,000 tests + 1,000 records | 10 minutes + 5 minutes<br>10 minutes + 5 minutes | 4,500 hours<br>250 hours |
| 242.125/127- Certificate Determination by Other Railroads/Other Country<br>- Determination Made by RR Relying on Another RR's Certification<br>- Determination by Another Country      | 677 railroads<br>677 railroads | 100 determin.<br>200 determin.                            | 30minutes<br>30 minutes                          | 50 hours<br>100 hours    |
| 242.203 – Retaining Information Supporting Determination -- Records<br>-- Amended Electronic Records   | 677 railroads<br>677 railroads | 18,000 recds<br>20 records                                | 15 minutes<br>60 minutes                         | 4,500 hours<br>20 hours  |
| 242.205 – List of Certified Conductors Working in Joint Territory  | 677 railroads                  | 625 lists   | 60 minutes                                       | 625 hours                |
| 242.209- Maintenance of Certificates<br>- Request to Display Certificate<br>- Notification That Request to Serve Exceeds Certification   | 677 railroads<br>677 railroads | 2,000 request /displays<br>1,000 notif.                   | 2 minutes<br>10 minutes                          | 67 hours<br>167 hours    |
| 242.211 – Replacement of Certificates  | 677 railroads                  | 500 certific.   | 5 minutes  | 42 hours                 |
| 242.213 –Multiple Certificates<br>- Notification to Engineer That No Conductor Is On Train<br>- Notification of Denial of Certification by Individuals Holding Multiple Certifications | 677 railroads<br>677 railroads | 5 notification<br>10 notific.                             | 10 minutes<br>10 minutes                         | 1 hour<br>2 hours        |
| 242.215 – RR Oversight Responsibility<br>- RR Review and Analysis of Administration of Certification Program<br>- Report of Findings by RR to FRA                                      | 677 railroads<br>677 railroads | 44 reviews/ Analyses<br>36 reports                        | 40 hours<br>4 hours                              | 1,760 hours<br>144 hours |
| 242.301 –Determinations -- Territorial Qualification and Joint Operations<br>- Notification by Persons Who Do Not Meet Territorial Qualification                                       | 320 railroads<br>320 railroads | 1,080 Deter.<br>500 Notific.                              | 15 minutes<br>10 minutes                         | 270 hours<br>83 hours    |

|   |                   |                            |                        |             |
|---|-------------------|----------------------------|------------------------|-------------|
| 242.401 –Notification to Candidate of Information That Forms Basis for Denying Certification and Candidate Response | 677 railroads     | 40 notific. + 40 responses | 60 minutes/ 60 minutes | 80 hours    |
| - Written Notification of Denial of Certification   | 677 railroads     | 40 notific.                | 60 minutes             | 40 hours    |
| 242.403/405 - Criteria for Revoking Certification; Periods of Ineligibility   | 677 railroads     | 950 reviews                | 10 minutes             | 158 hours   |
| - Review of Compliance Conduct  | 677 railroads     | 950 determin.              | 60 minutes             | 950 hours   |
| - Written Determination That the Most Recent Incident Has Occurred  |                   |                            |                        |             |
| 242.407 – Process for Revoking Certification  | 677 railroads     | 950 Revoked Certificates   | 8 hours                | 7,600 hours |
| - Revocation for Violations of Section 242.115(e)   | 677 railroads     | 950 suspend Certificate    | 1 hour                 | 950 hours   |
| - Immediate Suspension of Certificate   | 677 railroads     | 950 determin.              | 15 minutes             | 238 hours   |
| - Determinations Based on RR Hearing Record   | 677 railroads     | 950 records                | 30 minutes             | 475 hours   |
| - Hearing Record  | 677 railroads     | 950 decisions              | 2 hours                | 1,900 hours |
| - Written Decisions by RR Official  | 677 railroads     | 950 decisions              | 10 minutes + 5 minutes | 238 hours   |
| - Service of Written Decision on Employee by RR + RR Service Proof  | 54,000 Conductors | + 950 proofs               | 10 minutes             | 71 hours    |
| - Written Waiver of Right to Hearing  | 677 railroads     | 425 waivers                | 10 minutes             | 3 hours     |
| - Revocation of Certification Based on Information That Another Railroad Has Done So                                |                   | 15 revoked Certifications  |                        |             |
| -Placing Relevant Information in Record Prior to Suspending Certification/Convening Hearing                         | 677 railroads     | 100 updated records        | 1 hour                 | 100 hours   |

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202-493-6292 or Ms. Kimberly Toone at 202-493-6132 or via e-mail at the following addresses: [Robert.Brogan@dot.gov](mailto:Robert.Brogan@dot.gov); [Kimberly.Toone@dot.gov](mailto:Kimberly.Toone@dot.gov).

FRA cannot impose a penalty on persons for violating information collection

requirements which do not display a current OMB control number, if required. The assigned OMB approval number for the collection of information associated with this final rule is OMB No. 2130-0596.

D. Federalism Implications

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”

“Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The action will not have a substantial effect on the States or their political subdivisions; it will not impose any compliance costs; and it will not affect the relationships between the Federal government and the States or their political

subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this action could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “essentially local safety or security hazard” exception to section 20106.

In sum, FRA has analyzed this action in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this action has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this action is not required.

E. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered

unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This action is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this action in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. See 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA’s Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this action that might trigger the need for a more detailed environmental review. As a result, FRA finds that this action is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law,

assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$140,800,000 or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. The action will not result in the expenditure, in the aggregate, of \$140,800,000 or more in any one year, and thus preparation of such a statement is not required.

#### H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this action in accordance with Executive

Order 13211. FRA has determined that this action is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this action is not a “significant energy action” within the meaning of Executive Order 13211.

I. Privacy Act

Anyone is able to search the electronic form of all comments received into any of DOT’s dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT’s complete Privacy Act Statement published in the Federal Register on April 11, 2000 (Volume 65, Number 70, Pages 19477-78), or you may visit <http://www.regulations.gov/#!privacyNotice>.

**List of Subjects in 49 CFR Part 242**

Administrative practice and procedure, Conductor, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

**The Rule**

For the reasons discussed in the preamble, FRA amends part 242 of title 49 of the Code of Federal Regulations as follows:

**PART 242 – [AMENDED]**

1. The authority citation for part 242 continues to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

2. Section 242.103 is amended by revising paragraph (a) to read as follows:

**§ 242.103 Approval of design of individual railroad programs by FRA.**



(a) Each railroad shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B of this part according to the following schedule:

(1) A Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall submit a program no later than September 30, 2012; and

(2) A Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall submit a program no later than January 31, 2013.

\* \* \* \* \*

3. Section 242.105 is amended by revising paragraphs (a), (b), (d), and (e) to read as follows:

**§ 242.105 Schedule for implementation.**

(a) By September 1, 2012, each railroad shall:

(1) In writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of January 1, 2012; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(b) After September 1, 2012, each railroad shall:

(1) In writing, designate as a certified conductor any person who has been authorized by the railroad to perform the duties of a conductor between January 1, 2012 and the pertinent date in paragraph (d) or (e) of this section; and

(2) Issue a certificate that complies with § 242.207 to each person that it

designates.

\* \* \* \* \*

(d) After December 1, 2012, no Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(e) After April 1, 2013, no Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

\* \* \* \* \*

4. Section 242.205 is amended by revising paragraph (a) to read as follows:

**§ 242.205 Identification of certified persons and record keeping.**

(a) After September 1, 2012, a railroad shall maintain a list identifying each person designated as a certified conductor. That list shall indicate the types of service the railroad determines each person is authorized to perform and date of the railroad's certification decision.

\* \* \* \* \*

5. Section 242.215 is amended by revising paragraph (a) to read as follows:

**§ 242.215 Railroad oversight responsibilities.**

(a) No later than March 31 of each year (beginning in calendar year 2014), each

Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified conductors during the prior calendar year.

\* \* \* \* \*

6. Section 242.301 is amended by revising paragraph (c) to read as follows:

**§ 242.301 Requirements for territorial qualification.**

\* \* \* \* \*

(c) Except as provided in paragraph (e) of this section, if a conductor lacks territorial qualification on main track physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a person who meets the territorial qualification requirements for main track physical characteristics.

(1) For a conductor who has never been qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, the assistant shall be a person who is certified as a conductor, meets the territorial qualification requirements for main track physical characteristics, and is not an assigned crew member.

(2) For a conductor who was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has been expired for one year or less and who regularly traversed the territory prior to the expiration of the qualification, the assistant may be any person, including an assigned crewmember, who meets the territorial qualification requirements for main track physical characteristics.

(3) For a conductor who was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, and whose qualification has been expired for one year or less but who has not regularly traversed the territory prior to the expiration of the qualification, or a conductor whose territorial qualification on main track has been expired for more than a year, the assistant may be any person, including an assigned crewmember other than the locomotive engineer so long as serving as the assistant would not conflict with that crewmember's other safety sensitive duties, who meets the territorial qualification requirements for main track physical characteristics.

\* \* \* \* \*

7. Appendix B to part 242 is amended by revising Section 2 to read as follows:

**APPENDIX B TO PART 242—PROCEDURES FOR SUBMISSION AND  
APPROVAL OF CONDUCTOR CERTIFICATION PROGRAMS**

\* \* \* \* \*

Section 2 of the Submission: Training Persons Previously Certified

The second section of the request must contain information concerning the railroad's program for training previously certified conductors. As provided for in § 242.119(l) each railroad must have a program for the ongoing education of its conductors to assure that they maintain the necessary knowledge concerning operating rules and practices, familiarity with physical characteristics, and relevant Federal safety rules.

Section 242.119(l) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the

frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its conductors remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.119(l). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the training environment employed (for example, use of classroom, use of computer based training, use of film or slide presentations, and use of on-job-training) and which aspects of the program are voluntary or mandatory.

Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, conductors need to have their fundamental knowledge of operating rules and procedures refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of particular concern to FRA is how each railroad acts to ensure that conductors remain knowledgeable about the territory over which a conductor is authorized to perform but from which the conductor has been absent. The railroad must have a plan for the familiarization training

that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory conductors are authorized to work over.

In addition to stating how long a conductor must be absent from a territory before their qualification on the physical characteristics of the territory expires, railroads must also state in their programs the number of times a person must pass over a territory per year to be considered to have “regularly traversed” a territory for purposes of § 242.301(c). Since territories differ in their complexity, railroads will be given discretion to determine how many times a conductor must pass over a territory to be considered to have “regularly traversed” a territory.

\* \* \* \* \*

Issued in Washington, DC, on \_February 2, 2012\_ .

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Joseph C. Szabo  
Administrator.

[FR Doc. 2012-2915 Filed 02/07/2012 at 8:45 am; Publication Date: 02/08/2012]